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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 196..

No. 979

RODNEY BERNARD, JR., Trustee,
Petitioner.

versus

BENEFICIAL FINANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	5
Reasons for Granting the Writ	6
Conclusion	12
Appendix A — Statutes	15
Bankruptcy Act of 1898, c 541, 30 Stat. 544, amended:	
Section 1 (29a) (11 USC 1964 ed. Sec. 1 (29a))	15
Section 67b (11 USC 1964 ed. Sec. 107 (b))	15
Section 67c (1) (11 USC 1964 ed. Sec. 107 (c))	16
Section 70c (11 USC 1964 ed. Sec. 110 (c))	18
Public Law 89-495	19
LSA C. C. 3227	24
3228	24
3229	25
3230	25
3231	25
3217 (7)	25
LSA CCP Art. 3571	26
Appendix B — Opinions and Judgment Below	27
Referee's Opinion	27
Opinion of the District Court	30
Opinion of the United States Court of Appeals for the Fifth Circuit	45

INDEX (continued)

Page

Appendix C — Conflicting Opinion
New Orleans Terminal Co. vs. Hanson, 188 Fed. 638 49

Appendix D — Extract from Senate Report 1159 on H.R. 136 63

CITATIONS

Cases:

New Orleans Terminal Co. vs. Hanson, 188 Fed. 638.... 11

Statutes:

Bankruptcy Act of 1898, c 541, 30 Stat. 544, as amended:

Section 1 (29a) (11 USC 1964 ed. Sec. 1 (29a)) 2, 4

Section 67b (11 USC 1964 ed. Sec. 107 (b)) 3, 4

Section 67c (1) (11 USC 1964 ed. Sec. 107 (c)) 5

Section 67c (1) (A) (11 USC 1964 ed. Sec. 107(c) (1) (A)) 3, 10

Section 67c (1) (B) (11 USC ed. Sec. 107 (c) (1) (B)) 2, 3, 6, 7, 9

Section 70c (11 USC 1964 ed. Sec. 110 (c)) 4, 5, 10

LSA C.C. Art 3227 2

3228 5

3229 5

3230 5

3231 5

INDEX—(Continued)

	Page
3217 (7)	5
LSA CCP Art. 3571	2, 5, 7, 9
Public Law 89-495, July 5, 1966, 80 Stat. 268	5, 7, 8
28 USC 1254 (1)	2

Miscellaneous

3A Collier on Bankruptcy, 14th Ed., Section 64.501, page 2246, n. 6	11
Extract from Senate Report No. 1159 on H.R. 136	12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Rodney Bernard, Jr., Trustee in the matter of Caldwell Joseph Trahan, Number 16702 in Bankruptcy, in the District Court of the United States, Western District of Louisiana, Lafayette Division, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, dated and entered in the above entitled case on November 26, 1968.

OPINIONS BELOW

The opinion of the referee is not reported and is printed in Appendix B hereto, infra, pages 27-29. The opinion of the District Court, printed in Appendix B hereto, infra, pages 30-44, is reported in 283 Fed.

Supp , 620. The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix B hereto, infra pages 45 - 46, is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 26, 1968, R 53; Appendix B, infra pages 46 - 47. The jurisdiction of the Court is invoked under 28 U.S. Code 1254 (1).

QUESTIONS PRESENTED

1. Whether The First Proviso Of (B) Of Section 67c (1) Of The Bankruptcy Act, Providing For Perfection Of Liens After Bankruptcy, Permits Perfection Against The Trustee Where The Applicable State Statutes Do Not Permit Perfection Retroactively Against Someone Who Has Become A Bona Fide Purchaser In Possession Before Perfection Is Accomplished.

2. Whether The Louisiana Code Of Civil Procedure Remedy Of Sequestration (LSA CCP Art. 3571), Available In A Suit To Enforce Any Lien If The Defendant Is In Default In His Obligation And It Is In The Power Of The Defendant To Dispose Of The Property, Provides A Time Within Which To Perfect A Vendor's Privilege On Movable Property (Personal Property) As A Lien Against A Bona Fide Purchaser And A Manner For Its Perfection As Such Lien—Affording A Means After Bankruptcy For Perfecting The Vendor's Privilege Against The Trustee Under The First And Second Provisos of (B) Of Section 67c(1) Of The Bankruptcy Act.

3. Whether The Louisiana Vendor's Privilege On Movable Property Under LSA CC 3227 Is A True Statutory Lien Within The Meaning Of Section 1(29a) And

Subdivision b Of Section 67 Of The Bankruptcy Act Or A Mere Priority Not Effective In Bankruptcy.

4. Whether The Vendor's Privilege (Which Cannot Be Enforced Under Louisiana Laws Against A Debtor Not In Default), Even If A Lien And Otherwise Perfectable After Bankruptcy, Is Valid Against The Trustee Under Subdivision c (1) (A) Of Section 67 Of The Bankruptcy Act.

STATUTES INVOLVED

The principal statutory provisions involved in the first and second questions are part (B) of Clause (1) of subdivision c of Section 67 of The Bankruptcy Act [11 U.S.C. § 107 (c) (1) (B)] reading as follows:

> "c. (1) The following liens shall be invalid against the trustee:
>
> "* * *
>
> "(B) every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists: *Provided*, That where a statutory lien is not invalid at the date of bankruptcy against the trustee under subdivision c of section 70 of this Act and is required by applicable lien law to be perfected in order to be valid against a subsequent bona fide purchaser, such a lien may nevertheless be valid under this subdivision if perfected within the time permitted by and in accordance with the requirements of such law: *And provided further*, That if applicable lien law requires a lien valid against the trustee under section 70, subdivision c, to be perfected by the seizure of property, it shall instead be perfected as permitted by this subdivision c of section 67 by filing notice thereof with the court;"

And subdivision c of Section 70 of The Bankruptcy Act (11 U.S.C. §110c) reading as follows:

> "c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien; whether or not such a creditor exists. If a transfer is valid in part against creditors whose rights and powers are conferred upon the trustee under this subdivision, it shall be valid to a like extent against the trustee. In cases where repugnancy or inconsistency exists with reference to the rights and powers in this subdivision conferred, the trustee may elect which rights and powers to exercise with reference to a particular party, a particular remedy, or a particular transaction, without prejudice to his right to maintain a different position with reference to a different party, a different remedy, or a different transaction."

These and other statutory provisions are set forth in Appendix A, infra pages 15 through 26; Section 1(29a) of the Bankruptcy Act (11 U.S.C. 1(29a)), Subdivision b of Section 67 of the Bankruptcy Act, (11 U.S.C.

107b), Subdivision c of Section 67 of the Bankruptcy Act (11 U.S.C. 107c) and Subdivision c of Section 70 of the Bankruptcy Act (11 U.S.C. 110c), Public Law 89-495 (80 Stat., 268), LSA C.C. 3227, 3228, 3229, 3230, 3231, 3217 (7), LSA CCP Art. 3571.

STATEMENT

The basis for federal jurisdiction in the court of first instance was that the case arose under the Bankruptcy Act. (Bankruptcy Act of 1898, c 541, 30 Stat., 544, as amended).

Beneficial Finance Company is the assignee of a note of the bankrupt taken by a furniture store dealer when he sold the bankrupt certain items of furniture on credit, with reservation of the vendor's privilege, on which there is a balance due of $299.10. The property was in the possession of the bankrupt at the time his petition was filed. Referee's findings, R 3; District Court's opinion, R 21.

Beneficial Finance Company filed its proof of claim, claiming a vendor's lien on the furniture. The trustee opposed the claim of security and the referee sustained the opposition. Referee's order, R 6. The referee held that "the vendor's lien and privilege is not a true lien but is a priority provided by State law for distribution in cases of judicial sales or insolvency proceedings in the State courts", Referee's conclusions, R 5, Appendix B, infra, page 29, and, accordingly, declared Beneficial Finance Company's claim to be an unsecured claim.

Beneficial Finance Company petitioned for review and contended that the vendor's privilege is a true lien, that it is not invalidated by Section 67c (1) of the Bankruptcy Act, as amended, but, rather, can be perfected by

filing notice with the Bankruptcy Court in accordance with the First and Second Provisos of (B) of Section 67c (1).

The District Court held that under the laws of Louisiana the seller of movables on credit has a vendor's privilege to secure the credit portion of the purchase price so long as the movables remain in the purchaser's possession, that the privilege is a statutory lien, that it is not excluded from recognition by the provisions of Section 67c of the Act and, therefore, is entitled, upon filing notice in bankruptcy, to recognition under Section 67b of the Act. Opinion of the District Court, R 20-37, Appendix B, infra, pages 30 through 44. Judgment reversing the referee's order and classifying Beneficial Finance Company's claim as a secured claim was signed. Judgment in the District Court, R 38-39. The trustee appealed to the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the District Court in a thirteen line Per Curiam, R 51, Appendix B, infra, pages 45-46.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals, by affirming the District Court in a per curiam, has decided important questions of federal law which have not been, but should be, settled by this Court:

> "Having concluded that the vendor's privilege is a 'statutory lien', as that term is defined by the Bankruptcy Act, we now turn to Sec. 67 and 70(c) for resolution of the remaining issue before us. We have found no case law interpreting this recently amended section and applying it to Louisiana vendor's privilege. The problem is *res nova* and requires our considered attention."

Appendix B, infra, page 36. In re Trahan, 283 F. Supp. 624.

The amendment referred to is that of Public Law 89-495 (80 Stat. 268), Appendix A, infra, pages 19-23.

A.

The lower court held the first proviso of Section 67c (1) (B) makes it possible to perfect the privilege as a lien against the trustee within the time permitted by and in accordance with the law of the State of Louisiana. R 31, Appendix B, infra, page 43, 283 Fed. Supp. 627; that even though there is no substantive law of the State of Louisiana prescribing a time or a manner for perfecting a vendor's privilege, procedural means are sufficient; that is, the seller can seize the property, if still in the original buyer's possession, when the buyer is in default in his payments. This, despite agreement by the lower court that such seizure could not affect the rights of one who purchased bona fide from the original buyer and took possession after the sale but before seizure. R 29, Appendix B, infra, page 40, and the requirements of LSA CCP 3571 for sequestration that it be within the power of the defendant to dispose of the property (interalia). We submit that a reasonable interpretation of the provisos will apply them only to statutory liens of a type similar to those provided for by Section 67b which typically require recording or seizure within a limited period specified in days or months and that all that was intended was to allow the claimant the remainder of the fixed period to do the filing or seizing specified by the State Statute, where bankruptcy intervened before the full delay had elapsed (ten days more, for instance, if bankruptcy intervened 20 days after a 30 day period began to run) *and, then, only when the State Statute makes the lien, when perfected, apply retroactively so as to prime the rights of one who purchased bona fide after the lien arose, but before it was perfected.*

To hold otherwise is to substantially sterilize the preceding provisions of paragraph (B) of the subdivision.

The uncertainties resulting from the amendments of 1966 (Public Law 89-495, 80 Stat. 268) are pointed up in an article by Professor Frank R. Kennedy entitled "The Bankruptcy Amendments of 1966 Regulating Statutory Liens and the Priority and Dischargeability of Taxes" published in 41 JOURNAL OF THE NATIONAL CONFERENCE OF REFEREES IN BANKRUPTCY, page 158:

> "Perfection Post Bankruptcy
>
> The provisos of section 67c(1)(B) have puzzled some readers. The first proviso says in effect that any statutory lien which has not been perfected against a bona fide purchaser at the date of bankruptcy may nevertheless be so perfected if (1) the lien is good against the trustee under section 70c at the date of bankruptcy, and (2) the time allowed by state law for perfection against a subsequent bona fide purchaser has not expired.
>
> Does this proviso in effect establish a lien creditor test for statutory liens? * * * * * * * "

The true interpretation of "within the time and in accordance with the requirements of such law" is, and will continue to be, a constantly arising problem in the administration of the bankruptcy law which should be settled by a decision of this court.

B.

The lower court held:

> "Sec. 67c (1) (B) does not require the assumption that a 'bona fide purchaser' be in possession of the thing sold which is subject to the vendor's privilege". R 29, Appendix B, infra, page 40.

This, in effect, is a holding that a statutory lien is effective against the trustee if it is good against a bona fide purchaser *who has not taken possesson of the property.* This adds to "bona fide purchaser", as it appears in the Act, the words "who has taken possession of the property." We submit that by the use of "bona fide purchaser from the debtor on that date" Congress intended a purchaser who had title as bona fide purchaser on that date. Title passes with delivery and until delivery the intended purchaser is not a purchaser at all, bona fide or otherwise. The holding is contrary to the express terms of the Act.

C.

The lower court held that the seller's right, upon buyer's default, to file a suit to collect the price and sequester the property qualifies as the seizure of "applicable lien law" contemplated by the second proviso of Sec. 67c (1) (B). This proviso makes the filing of notice of claim with the bankruptcy court a substitute for a seizure where state law provides for seizure as a means of perfecting a lien. It is submitted that the seizure intended by the second proviso is one designed for *perfecting*, rather than conserving, and is not the type of conservatory seizure provided for generally by LSA CCP Art. 3571 (Appendix A pages 25 and 26) with respect to all kinds of liens, when the obligation is in default and "it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." If such a seizure is adequate to perfect a lien there is little or no vigor in Sec. 67c(1) (B) because all courts provide a means for enforcing liens after default by suit and seizure to enforce the lien and provide for similar conservatory measures.

D.

The lower court disposed of the trustee's contention that the privilege was invalid under Sec. 67c(1)(A) by the statement that the privilege is enforceable regardless of whether the debtor is insolvent or his property is being distributed or liquidated or whether or not the property has been seized by some other creditor seeking execution of a claim against it. But the lower court passed, sub silentio, the effect of the fact that none of these things can be done until default in payment and that a vendor's privilege not in default, under the lower court's holding, becomes triggered by the purchaser's bankruptcy.

It is submitted that a lien that cannot be enforced because not in default at the time of bankruptcy but becomes perfectable by notice to the bankruptcy court when bankruptcy ensues is a statutory lien "which first becomes effective upon the insolvency of the debtor, or upon distribution or liquidation of his property, or upon execution against his property levied at the instance of one other than the lienor." Bankruptcy is distribution or liquidation of property and the trustee occupies a position of one other than a lienor executing against the property. §70c Bankruptcy Act.

The fact that the bankrupt was delinquent in this particular case does not detract from the importance of deciding this question; not only because it would be an anomaly to say that a vendor's lien in default is effective and one not in default is not effective, but also because the lower court's decision did not turn upon the accidental circumstance that the bankrupt was delinquent in this case. It was based upon the broad, general holding that the vendor's privilege does not come within Sec. 67c(1)(A) and this should be corrected.

II.

The decision of the Court of Appeals for the Fifth Circuit is in conflict with the decision of the Circuit Court of Appeals, Sixth Circuit, on the nature of the Louisiana vendor's privilege; that is, whether the privilege is a lien or a mere right of priority.

In *New Orleans Terminal Co. vs. Hanson*, 188 Fed. 638, Appendix C, infra, pages 49-62, the Circuit Court of Appeals, Sixth Circuit, after exhaustive consideration, unequivocally held that the Louisiana vendor's privilege related to the remedy and was not a lien but a right of priority without any property right characteristics.

The holding of the lower court here that the vendor's privilege is a statutory lien is in direct conflict and it is important to administration of the Bankruptcy Act that this conflict be resolved because it has been a prime object of Congress to protect bankruptcy estates against spurious liens or disguised priorities.

> " 'For like reasons of policy, we have excluded, as indicated, all other state priorities. The necessity for so doing is obvious; many estates have been consumed, to the exclusion of creditors, by the ever-increasing classes of state priorities.' Analysis of H.R. 12889, 74th Cong., 2d Sess. (1936) 201."
>
> 3A Collier on Bankruptcy,
> 14th Ed., Sec. 64.501,
> page 2246, n. 6

The matter, then, is not merely one of a conflict between circuits concerning State law but a conflict as to the inherent nature of the claimed lien—one which must be resolved to determine whether Congress proscribed it as a mere priority entailing nothing resembling a property

right or recognized it as a true lien with property right characteristics.

III.

The questions presented are of great importance to the administration of bankruptcy laws, not only in the State of Louisiana and not only with respect to the vendor's privilege but everywhere in the United States and with respect to mechanic's liens, state tax liens, and liens of infinite descriptions provided for by the laws of 50 states and the Congress of the United States of America. Most bankruptcies have lien and priority problems and one or more of the matters upon which the lower court expressed its opinion will lurk in most of such cases.

Most bankruptcy cases in Louisiana will have the problem in connection with the vendor's privilege and in many cases the estate will be exhausted through the enforcement of such privileges if the doctrine of the lower court's decision is permitted to stand.

The express purpose of Congress, to strike at liens which are so tenuous that they can be defeated by transfer to a bona fide purchaser, would be frustrated by such a result. See the extract from Senate Report No. 1159 on H.R. 136, as shown on pages 2460 and 2461, West's U.S. Code-Congressional and Administrative News, Appendix D, page 63.

If the lower court is right, in a disturbing number of bankruptcies a few privileged creditors will get everything and unsecured creditors will get nothing.

CONCLUSION

To settle the important questions of bankruptcy law decided by the lower court, to aid the administration of

bankruptcy laws, and to protect unsecured creditors from the inroads of purported statutory liens which do not actually qualify for lien treatment under the 1966 Amendments to the Bankruptcy Act and to resolve a conflict between the decision of the Court of Appeals for the Fifth Circuit and the contrary decision of the Circuit Court of Appeals, Sixth Circuit, and to determine the effectiveness in bankruptcy of the infinite varieties of statutory liens which may not meet the tests of the 1966 Amendment, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRED SIMON
ARCHIE M. SIMON
Attorneys for Petitioner,
Rodney Bernard, Jr., Trustee

January 22, 1969

CERTIFICATE

I hereby certify that this petition has been served upon Beneficial Finance Company by depositing in a United States mail box a copy thereof, first class, postage prepaid, addressed to the attorneys it last had of record, now withdrawn with leave to Court, Mouton, Champagne & Colomb and George J. Champagne, Jr., at their last known address as furnished by them in the lower court as follows:

George J. Champagne, Jr.
Mouton, Champagne & Colomb
Post Office Box 2519
Lafayette, Louisiana 70501

and

I hereby certify that this Petition has been served upon Beneficial Finance Company by depositing in a

United States mail box a copy thereof, first class, postage prepaid, addressed to them at their last known address as determined after diligent inquiry as follows:

Beneficial Finance Company
407 Jefferson Street
Lafayette, Louisiana 70501

I hereby certify that Lafayette, Louisiana, is less than 500 miles from Shreveport, Louisiana;

and

I hereby certify that this petition has been served upon Caldwell Joseph Trahan, the bankrupt, by depositing in a United States mail box two (2) copies thereof, first class, to his attorneys, Bean and Rush and Warren D. Rush, addressed to them at their last known address as furnished by them in this proceeding as follows:

Warren D. Rush
Bean and Rush
Post Office Box 2336
Lafayette, Louisiana 70501

and

I hereby certify that all parties required to be served have been served.

Shreveport, Louisiana, this 24 day of January, 1969.

FRED SIMON
Attorney for
Rodney Bernard, Jr., Trustee

APPENDIX "A"

---

§1

* * * * * * *

(29a) "Statutory lien" shall mean a lien arising solely by force of statute upon specified circumstances or conditions, but shall not include any lien provided by or dependent upon an agreement to give security, whether or not such lien is also provided by or is also dependent upon statute and whether or not the agreement or lien is made fully effective by statute;

Bankruptcy Act of 1898, c 541, 30 Stat. 544, as amended: Section 1 (29a) (11 USC 1964 ed. Sec. 1 (29a))

§67

* * * * * * *

b. The provisions of section 60 of this Act to the contrary notwithstanding and except as otherwise provided in subdivision c of this section, statutory liens in favor of employees, contractors, mechanics, or any other class of persons, and statutory liens for taxes and debts owing to the United States or to any State or any subdivision thereof, created or recognized by the laws of the United States or any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition initiating a proceeding under this Act by or against him.

Bankruptcy Act of 1898, c 541, 30 Stat. 544, as amended: Section 67b (11 USC 1964 ed. Sec. 107 (b))

§67

* * * * * * *

c. (1) The following liens shall be invalid against the trustee:

* * * * * * * * *

(B) every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists: *Provided,* That where a statutory lien is not invalid at the date of bankruptcy against the trustee under subdivision c of section 70 of this Act and is required by applicable lien law to be perfected in order to be valid against a subsequent bona fide purchaser, such a lien may nevertheless be valid under this subdivision if perfected within the time permitted by and in accordance with the requirements of such law: *And provided further,* That if applicable lien law requires a lien valid against the trustee under section 70, subdivision c, to be perfected by the seizure of property, it shall instead be perfected as permitted by this subdivision c of section 67 by filing notice thereof with the court;

(C) every statutory lien for rent and every lien of distress for rent, whether statutory or not. A right of distress for rent which creates a security interest in property shall be deemed a lien for the purposes of this subdivision c.

(2) The court may, on due notice, order any of the aforesaid liens invalidated against the trustee to be preserved for the benefit of the estate and in that event the lien shall pass to the trustee. A lien not preserved for the benefit of the estate but invalidated against the trustee shall be invalid as against all liens indefeasible in bankruptcy, so as to have the effect of promoting liens inde-

feasible in bankruptcy which would otherwise be subordinate to such invalidated lien. Claims for wages, taxes, and rent secured by liens hereby invalidated or preserved shall be respectively allowable with priority and restricted as are debts therefor entitled to priority under clauses (2), (4), and (5) of subdivision a of section 64 of this Act, even though not otherwise granted priority.

(3) Every tax lien on personal property not accompanied by possession shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. Where such a tax lien is prior in right to liens indefeasible in bankruptcy, the court shall order payment from the proceeds derived from the sale of the personal property to which the tax lien attaches, less the actual cost of that sale, of an amount not in excess of the tax lien, to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. If the amount realized from the sale exceeds the total of such debts, after allowing for prior indefeasible liens and the cost of the sale, the excess up to the amount of the difference between the total paid to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act and the amount of the tax lien, is to be paid to the holder of the tax lien.

(4) Where a penalty not allowable under subdivision j of section 57 is secured by a lien, the portion of the lien securing such penalty shall not be eligible for preservation under this subdivision c.

(5) This subdivision c shall not apply to liens enforced by sale before the filing of the petition, nor to liens against property set aside to the bankrupt as exempt, nor to liens against property abandoned by the trustee or unadministered in bankruptcy for any reason and shall not

apply in proceedings under section 77 of this Act, nor in proceedings under chapter X of this Act unless an order has been entered directing that bankruptcy be proceeded with.

Bankruptcy Act of 1898, c 541, 30 Stat. 544, as amended. Section 67c (1) (11 USC 1964 ed. Sec. 107 (c))

---

§ 70

* * * * * * * *

c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists. If a transfer is valid in part against creditors whose rights and powers are conferred upon the trustee under this subdivision, it shall be valid to a like extent against the trustee. In cases where repugnancy or inconsistency exists with reference to the rights and powers in this subdivision conferred, the trustee may elect which

rights and powers to exercise with reference to a particular party, a particular remedy, or a particular transaction, without prejudice to his right to maintain a different position with reference to a different party, a different remedy, or a different transaction.

Bankruptcy Act of 1898, c 541, 30 Stat. 544, as amended. Section 70c (11 USC 1964, ed. Sec. 110(c))

PUBLIC LAW 89-495
89th CONGRESS, H. R. 136
JULY 5, 1966

AN ACT

80 STAT. 268

To amend sections 1, 17a, 64a(5), 67(b), 67c, and 70c of the Bankruptcy Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 (11 U.S.C. 1) of the Bankruptcy Act approved July 1, 1898, as amended, is amended by inserting after paragraph 29 the following new paragraph:

Bankruptcy. Statutory liens. 30 Stat. 544; 52 Stat. 840.

"(29a) 'Statutory lien' shall mean a lien arising solely by force of statute upon specified circumstances or conditions, but shall not include any lien provided by or dependent upon an agreement to give security, whether or not such lien is also provided by or is also dependent upon statute and whether or not the agreement or lien is made fully effective by statute."

Sec. 2. Clause (5) of subsection a of section 64 of said Act (11 U.S.C.104(a)) is amended to read as follows:

Debts having priority.

80 STAT. 268

"(5) debts other than for taxes owing to any person, including the United States, who by the laws of the United States is entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law or who is entitled to priority by paragraph (2) of subdivision c of section 67 of this Act: *Provided, however,* That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy."

66 Stat. 427.

Sec. 3. Subsection b of section 67 of said Act (11 U.S.C. 107(b)), is amended to read as follows:

11 USC 96.

"b. The provisions of section 60 of this Act to the contrary notwithstanding and except as otherwise provided in subdivision c of this section, statutory liens in favor of employees, contractors, mechanics, or any other class of persons, and statutory liens for taxes and debts owing to the United States or to any State or any subdivision thereof, created or recognized by the laws of the United States or any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition initiating a proceeding under this Act by or against him."

Sec. 4. Subsection c of section 67 of said Act (11 U.S.C. 107(c)) is amended to read as follows:

"c. (1) The following liens shall be invalid against the trustee:

"(A) every statutory lien which first becomes effective upon the insolvency of the debtor, or upon distribution or liquidation of his property, or upon execution against his property levied at the instance of one other than the lienor;

"(B) every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists: *Provided*, That where a statutory lien is not invalid at the date of bankruptcy against the trustee under subdivision c of section 70 of this Act and is required by applicable lien law to be perfected in order to be valid against a subsequent bona fide purchaser, such a lien may nevertheless be valid under this subdivision if perfected within the time permitted by and in accordance with the requirements of such law: *And provided further*, That if applicable lien law requires a lien valid against the trustee under section 70, subdivision c, to be perfected by the seizure of property, it shall instead be perfected as permitted by this subdivision c of section 67 by filing notice thereof with the court;

Post, p. 269.

"(C) every statutory lien for rent and every lien of distress for rent, whether statutory or not. A right of distress for rent which creates a security interest in property shall be deemed a lien for the purposes of this subdivision c.

"(2) The court may, on due notice, order any of the aforesaid liens invalidated against the trustee to be preserved for the benefit of the estate and in that event the lien shall pass to the trustee. A lien not preserved for the benefit of the estate but invalidated against the trustee shall be invalid as against all liens indefeasible in bankruptcy, so as to have the effect of promoting liens indefeasible in bankruptcy which would otherwise be subordinate to such invalidated lien. Claims for wages, taxes, and rent secured by liens hereby invalidated or preserved shall be respectively allowable with priority and restricted as are debts therefor entitled to priority under clauses (2), (4), and (5) of subdivision a of section 64 of this Act, even though not otherwise granted priority.

Claims for wages, etc.

"(3) Every tax lien on personal property not accompanied by possession shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. Where such a tax lien is prior in right to liens indefeasible in bankruptcy, the court shall order payment from the proceeds derived from the sale of the personal property to which the tax lien attaches, less the actual cost of that sale, of an amount not in excess of the tax lien, to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. If the amount realized from the sale exceeds the total of such debts, after allowing for prior indefeasible liens and the cost of the sale, the excess up to the amount of the difference between the total paid to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act and the amount of the tax lien, is to be paid to the holder of the tax lien.

11 USC 104; Post, p. 271. Liens on personal property.

"(4) Where a penalty not allowable under subdivision j of section 57 is secured by a lien, the portion of the lien securing such penalty shall not be eligible for preservation under this subdivision c.

11 USC 93.

"(5) This subdivision c shall not apply to liens enforced by sale before the filing of the petition, nor to liens against property set aside to the bankrupt as exempt, nor to liens against property abandoned by the trustee or unadministered in bankruptcy for any reason and shall not apply in proceedings under section 77 of this Act, nor in proceedings under chapter X of this Act unless an order has been entered directing that bankruptcy be proceeded with."

11 USC 205.

Sec. 5. Subsection c of section 70 of said Act (11 U.S.C. 110(c)) is amended to read as follows:

11 USC 501. Trustee defenses; rights and powers.

"c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, includ-

ing statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists. If a transfer is valid in part against creditors whose rights and powers are conferred upon the trustee under this subdivision, it shall be valid to a like extent against the trustee. In cases where repugnancy or inconsistency exists with reference to the rights and powers in this subdivision conferred, the trustee may elect which rights and powers to exercise with reference to a particular party, a particular remedy, or a particular transaction, without prejudice to his right to maintain a different position with reference to a different party, a different remedy, or a different transaction."

Approved July 5, 1966.

LEGISLATIVE HISTORY:
HOUSE REPORT No. 686 (Comm. on the Judiciary).
SENATE REPORTS: No. 999 (Comm. on Finance and No. 1159 (Comm. on the Judiciary); accompanying S. 1912 No. 277 (Comm. on the Judiciary) and No. 997 (Comm. on Finance).
CONGRESSIONAL RECORD:
Vol. 111 (1965):
Aug. 2, considered and passed House.
Vol. 112 (1966):
June 21, considered and passed Senate, amended.
June 23, House concurred in Senate amendments.

§ 5—Of the Privilege of the Vendor of Movable Effects

Art. 3227. He who has sold to another any movable property, which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale was made on a credit or without, if the property still remains in the possession of the purchaser.

So that although the vendor may have taken a note, bond or other acknowledgment from the buyer, he still enjoys the privilege.

Any person who may sell the argicultural products of the United States in the city of New Orleans [Orleans], shall be entitled to a special lien and privilege thereon to secure the payment of the purchase money, for and during the space of five days only, after the day of delivery; within which time the vendor shall be entitled to seize the same in whatsoever hands or place they may be found, and his claim for the purchase money shall have preference over all others. If the vendor gives a written order for the delivery of any such products and shall say therein that they are to be delivered without vendor's privilege, then no lien shall attach thereto.

Art. 3228. But if he allows the things to be sold, confusedly with a mass of other things belonging to the purchaser, without making his claim, he shall lose the privilege, because it will not be possible in such a case to ascertain what price they brought.

Art. 3229. If the sale was not made on credit, the seller may even claim back the things in kind, which were thus sold, as long as they are in possession of the purchaser, and prevent the resale of them; provided the claim for restitution be made within eight days of the delivery at farthest, and that the identity of the objects be established.

Art. 3230. When the things reclaimed consist in merchandise, which is sold in bales, packages or cases, the claim shall not be admitted if they have been untied, unpacked or taken out of the cases and mixed with other things of the same nature belonging to the purchaser, so that their identity can no longer be established.

Art. 3231. But if the things sold are of such a nature as to be easily recognized, as household furniture, even although the papers or cloths, which covered them at the time of delivery, be removed, the claim for restitution shall be allowed.

LSA C.C. Articles 3227-3231.

Art. 3217. The debts which are privileged on certain movables, are the following:

* * * * *

7. The price due on movable effects, if they are yet in the possession of the purchaser.

* * * * *

LSA C.C. Article 3217(7).

Art. 3571. Grounds for sequestration

When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action.

LSA Code of Civil Procedure Article 3571.

APPENDIX "B"

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF LOUISIANA

No. 16702
IN BANKRUPCTY

IN THE MATTER OF:
CALDWELL JOSEPH TRAHAN

FINDINGS OF FACT AND CONCLUSIONS
OF LAW ON TRUSTEE'S OBJECTION TO
ALLOWING BENEFICIAL FINANCE COMPANY'S
CLAIM AS SECURED

Beneficial Finance Company filed its proof of claim for $299.10 as a secured claim, asserting a vendor's lien on:

1—Hotpoint Refrigerator (Coppertone)
1—Electric Stove
1—Memphis Maple Desk, Chair and Mirror
1—Innerspring Mattress and Box Spring 4/6
1—5 pc. Dinette (Wal.) Brown

The Trustee filed a petition to have the vendor's lien declared invalid and ruled the claimant to show cause why its claim should not be declared unsecured. The property has been sold by the Trustee and lien claims referred to the proceeds.

The rule herein came on regularly for hearing on May 3, 1967. Defendant in Rule, Beneficial Finance Com-

pany, was represented at the hearing by its attorney, George Champagne. Petitioner, Rodney Bernard, Jr., Trustee, represented himself. Evidence was submitted and arguments presented. The matter was taken under advisement and briefs requested. The briefs having been submitted and considered and due deliberation having been had on the evidence presented at said hearing and the applicable law, I do decide and find as follows:

FINDINGS OF FACT

1.

That Respondent, Beneficial Finance Company, sold the subject merchandise to the bankrupt on March 17, 1966, retaining a vendor's lien and privilege for the unpaid balance of the purchase price, amounting to $490.11.

2.

That the vendor's lien and privilege was filed for record in the office of the Clerk of Court, Lafayette Parish, Louisiana, on January 4, 1967, five days after bankruptcy.

3.

That at bankruptcy $299.10 remained due and owing on the purchase price of said property, an amount in excess of the $100.00 for which said property was sold by the Trustee.

4.

That Beneficial Finance Company duly filed its claim as a claim secured by a vendor's lien and privilege.

CONCLUSIONS OF LAW

1.

Beneficial Finance Company had a vendor's lien and privilege under Louisiana C.C. Article 3227 when the bankrupt was adjudicated.

2.

The vendor's lien and privilege is not a true lien but is a priority provided by State law for distribution in cases of judicial sales or insolvency proceedings in the State courts.

> "The privilege given to a seller of movable property by Civ. Code La. art. 3227, which provides that 'he who has sold to another any movable property which is not paid for has a preference on the price of his property over the other creditors of the purchaser whether the sale was made on credit or without' is not a contract lien on the property but merely a preference over other creditors in the proceeds pertaining to the remedy or administration of the debtor's property, . . ."
>
> *New Orleans Terminal Co. v. Hanson*, 188 Fed. 638 (6th Cir. 1911)

3.

In bankruptcy, priorities are governed by the bankruptcy statute and not by state law and the Trustee is, thereof, entitled to have the claim of Beneficial Finance Company as declared to be an unsecured claim.

Shreveport, Louisiana, June 15, 1967.

/s/ LeRoy Smallenberger
Referee in Bankruptcy

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

NUMBER 16,702
IN BANKRUPTCY

IN THE MATTER

OF

CALDWELL JOSEPH TRAHAN

FOR BANKRUPT:

Messrs.

Bean and Rush, Warren D. Rush,
Post Office Box 2336
Lafayette, Louisiana 70501

FOR BENEFICIAL FINANCE COMPANY:

Mouton, Champagne, & Colomb,
George J. Champagne, Jr.,
Post Office Box 2519,
Lafayette, Louisiana

AMICUS CURIAE:

Archie M. Simon,
Post Office Box 1726,
Shreveport, Louisiana

TRUSTEE:

Rodney Bernard, Jr.
Post Office Box 3265
Lafayette, Louisiana

R. J. PUTNAM, DISTRICT JUDGE

This case presents for review the question of whether or not the vendor's privilege afforded to the seller of merchandise under the law of Louisiana (LSA-C.C. art. 3227) is a statutory lien valid against the trustee in bankruptcy under the Bankruptcy Act, Sections 1(29a), 67(b), (c) and 70(c), as amended July 5, 1966, P.L. 89-495, 11 U.S.C.A. §§ 1(29a), 107(b), (c) and 110(c). The Referee held that it was not and allowed the trustee's claim for costs to be satisfied in preference to that of the creditor. Beneficial Finance Company (hereinafter referred to as Beneficial).

Beneficial is the assignee of the note of a furniture store dealer who sold the bankrupt certain items of furniture on credit, with reservation of the vendor's privilege, on which there is a balance due of $299.10. The property was in the possession of the bankrupt at the time his petition was filed. (See, Bankruptcy Act, Section 1(13); 11 U.S.C.A. 1(13).) Resolution of this case involves a consideration of the method of distribution of the assets of the bankrupt, provided for by the Bankruptcy Act, and of the nature of the Louisiana "vendor's privilege".

It is the policy of the Act to allow secured creditors, those having *liens* upon the assets of the bankrupt, to have their claims recognized first; and the Act does not seek to jeapordize this secured status except where that intent is clear. Section 67(b) and (c), as amended, 11 U.S. C.A. § 107(b) (c). See, *Commercial Credit Co. v. Davidson*, 112 F. 2d 54 (5 Cir. 1940); *In Re Brannon*, 62 F. 2d 959 (5 Cir. 1933); *In Re Polumbo*, 271 F. Supp. 640 (W.D. Va. 1967); *In Re Empire Granite Co.*, 42 F. Supp. 450 (M.D. Ga. 1942); *Tatum v. Acadian Production Corp.*, 35 F. Supp. 40, 48 (E.D. La. 1940); Collier on Bankruptcy, Vol. 4, § 67.02 at p. 34, § 67.20[1] at p. 211, and § 67.25[1] (14 ed. 1967); Senate Rep. No. 1159, U.S. Code Cong. &

Admin. News, Vol. 2, pp. 2467 (1966). However, there is also a policy against allowing those creditors whose only security is a *state-created priority* which is not a "lien" to assert their "priority" claims as secured claims against the assets. *Elliott v. Bumb*, 356 F. 2d 749 (9 Cir. 1966); *Strom v. Peikes*, 123 F. 2d 1003 (2 Cir. 1941). This policy was strengthened by the 1966 amendments to the Act. Collier, supra, Vol. 4, § 67.20[2] at p. 219 and n. 16d, § 67.20[3] at pp. 227-228; Senate Rep. No. 1159, U.S. Code, Cong. Admin. News, supra, pp. 2457, 2461, 2467. If the petitioner has a lien recognized in bankruptcy, then his claim primes that of the trustee; a claim based upon a priority would not.

Decision of the case at bar depends in part upon federal law and in part on the law of Louisiana. It is the state law that determines the nature of the vendor's privilege; but it is the Bankruptcy Act which determines whether or not a right of that nature is a secured claim in bankruptcy. *Halpert v. Industrial Commissioner of State of New York*, 147 F. 2d 375 (2 Cir. 1945); *Commercial Credit Co. v. Davidson*, supra, p. 55; *In Re Brannon*, supra. Collier, supra, Vol. 4, § 67.20[2] at pp. 219-220, § 67.25[1] at pp. 347-348. The courts apply this principle in *City of New Orleans v. Harrell*, 134 F. 2d 399 (5 Cir. 1943); *Strom v. Peikes*, supra; *Brown Shoe Co. v. Wynne*, 281 F. 807 (5 Cir. 1922) (Mississippi vendor's lien); *Norris v. Trenholm*, 209 F. 827 (5 Cir. 1913) (Mississippi vendor's lien).

This case hinges upon an interpretation and application of Sections 67(b) and (c)(1)(A) and (B), and 70(c) of the Bankruptcy Act.[1] Section 67(b) of the Act provides

[1] Section 67(b), (c)(1)(A) & (B):
"(b) The provisions of section 96 of this title to the contrary notwithstanding and except as otherwise provid-
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that "statutory liens" will be recognized as secured claims in bankruptcy, so long as they are not excluded by the provisions of Section 67(c). Statutory liens are defined for the first time by Section 1(29a), 11 U.S.C.A. 1(29a), added by the 1966 amendment as follows:

> " 'Statutory lien' shall mean a lien arising solely by force or statute upon specified circumstances or conditions, but shall not include any lien provided by or dependent upon an agreement to give security, whether or not such lien is also provided by or is also dependent upon statute and whether or not the agreement or lien is made fully effective by statute." (As amended July 5, 1966.)

This definition is broad in its scope, and it has been said that a statutory lien is "one arising 'primarily from an economic relationship defined by the legislature'." *Lawrence v. United States*, 378 F. 2d 452, 467 (5 Cir. 1967). *In Re New Haven Clock & Watch Co.*, 253 F. 2d 577 (2 Cir. 1958); Collier, supra, Vol. 4 § 67.20[2], p. 217. See,

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(continued)

ed in subdivision (c) of this section, statutory liens in favor of employees, contractors, mechanics, or any other class of persons, and statutory liens for taxes and debts owing to the United States or to any State or any subdivision thereof, created or recognized by the laws of the United States or any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition initiating a proceeding under this title by or against him.

"(c)(1) The following liens shall be invalid against the trustee:

(A) every statutory lien which first becomes effective upon the insolvency of the debtor, or upon distribution or liquidation of his property, or upon execution against his property levied at the instance of one other than the lienor;

(B) every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists: *Provided*, That where a statutory lien is not invalid at the date of bankruptcy against the

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Collier, supra, Vol. 1, § 1.00, p. 47 (1967 cumulative supplement).

Adhering to concepts of "mortgage" and "privilege", the Louisiana Civil Law system provides security devices to certain classes of persons which, in the common law, might be called *liens*. The vendor's privilege cannot be excluded from definitional coverage under Section 1(29a) merely because Article 3227 uses the word "privilege" instead of "lien"; the nature of privilege, though different from that of the *common law lien*, is close to that of a *statutory lien;* the concepts being similar, the words are often used interchangeably. Daggett, *Louisiana Privileges and Chattel Mortgages*, § 1 at p. 1, § 2 at pp. 4-5 (1942); Dainow, "Vicious Circles in the Louisiana Law of Privileges," 25 La. Law Rev. 1, n. 1, (1964); Slovenko, "Of Pledge," 33 Tul. Law. Rev. 59, 60 (1958); 53 C.J.S.—Liens, § 1d, p. 833; *Black's Law Dictionary*, "LIEN: Roman or Civil Law" (4 ed. 1951).

There have been cases in which the bankruptcy courts have recognized the vendor's privilege as a secured claim or "lien" in bankruptcy. *Clyde Iron Works v. Frerichs*, 203 F. 637 (5 Cir. 1913); *In Re Bentz*, 267 F. 606 (E.D. La. 1920) (reversed on other grounds, *Sherer-Gillett Co.*

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trustee under subdivision (c) of Section 70 of this Act and is required by applicable lien law to be perfected in order to be valid against a subsequent bona fide purchaser, such a lien may nevertheless be valid under this subdivision if perfected within the time permitted by and in accordance with the requirements of such law: *and provided further*, That if applicable lien law requires a lien valid against the trustee under section 70(c) of this title to be perfected by the seizure of property, it shall instead be perfected as permitted by this subdivision by filing notice thereof with the court. * * * "

Section 70(c):

"(c) The trustee may have the benefit of all defenses available to the bankrupt as against third persons, includ-

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v. Pilsbury, 269 F. 595 (5 Cir. 1921)); *In Re New Orleans Milling Co., Inc.*, 263 F. 254 (E.D. La. 1920). *Sessler v. Paducah Distilleries Co.*, 168 F. 44 (5 Cir. 1909). See, *In Re Smith*, 51 F. 2d 290 (S.D. Miss. 1931); *Globe Automatic Sprinkler Co. v. Bell*, 183 La. 937, 165 So. 150 (1936); *Lehman, Stern & Co. v. E. Martin & Co.*, 132 La. 231, 61 So. 212 (1913) (affirmed, 236 U.S. 448, 35 S. Ct. 307 (1914); *Alphonse Brenner Co. v. Owens*, 136 So. 122 (La. App. 1931). Compare, *Marshall v. Knox*, 16 Wall. 551, 83 U.S. 481 (1872) (which involved a Louisiana lessor's privilege); *Arkansas Fuel Oil Co. v. Leisk*, 133 F. 2d 79 (5 Cir. 1943) (which involved the Louisiana privilege in favor of carriers).

We conclude that a vendor's privilege meets the definitional requirements of Section 1(29a), because it is a "statutory lien" which arises by operation of law upon the happening of a specified circumstance. La. Civ. Co.

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ing statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists. If a transfer is valid in part against creditors whose rights and powers are conferred upon the trustee under this subdivision, it shall be valid to a like extent against the trustee. In cases where repugnancy or inconsistency exists with reference to the rights and powers in this subdivision conferred, the trustee may elect which rights and powers to exercise with reference to a particular party, a particular remedy, or a particular transaction, without prejudice to his right to maintain a different position with reference to a different party, a different remedy, or a different transaction."

arts. 3186, 3227.[2] It would not fall under the exclusionary provision of Section 1(29a), because it can not be created by agreement of the parties. It results from the nature of the debt and arises only by operation of law. LSA-C.C. art. 3185. Daggett, supra, § 37, p. 96; Planiol, *Traité Elémentaire De Droit Civil*, No. 2544, pp. 425-426 (11 ed. 1939, trans. Louisiana State Law Institute, 1959); Bonomo, *Saunder's Lectures on the Civil Code*, p. 503 (1925); Dainow, "Ranking Problems of Chattel Mortgages and Civil Code Privileges in Louisiana Law," 13 La. Law Rev. 537, 545 (1953).

Having concluded that the vendor's privilege is a "statutory lien", as that term is defined by the Bankruptcy Act, we now turn to Sections 67 and 70(c) for resolution of the remaining issue before us. We have found no case law interpreting this recently amended section and applying it to the Louisiana vendor's privilege. The problem is *res novo* and requires our considered attention.

Because of circuity of liens resulting from the application of State law to determine the rank of statutory liens created by State legislatures in many fields, Congress felt a need to protect the order of distribution of proceeds of the bankrupt's estate as provided for in the Act; the 1966 amendments to these sections of the Bankruptcy Act are the consequence. Statutory liens which do not meet the requirements of 67(c) are not given secured status; for the purposes of the Act, they are state-created prior-

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[2] La. Civ. Code Art. 3227:

"He who has sold to another any movable property, which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale was made on a credit or without, if the property still remains in the possession of the purchaser.

"So that although the vendor may have taken a note, bond or other acknowledgment from the buyer, he still enjoys the privilege. * * *"

ities, not recognized in bankruptcy.[3] Senate Rep. No. 1159, U.S. Code Cong. & Admin. News, supra, p. 2456 et seq. See, Collier, supra, Vol. 4, § 67.02 at p. 34, § 67.20[1] at p. 211, § 67.20[2] and n. 16d at pp. 219-220, § 67.20[3.1] at p. 228. A statutory lien will be viewed as such a priority when (1) it does not become effective until the debtor is insolvent or his property is being distributed or liquidated, or (2) it does not become effective until another creditor seeks execution of a claim against the property (67(c)(1)(A)), or (3) it would not be enforceable against a *bona fide purchaser* (Bankruptcy Act, Section 1(5); 11 U.S.C.A. 1(5)) on the date of bankruptcy, provided that if the lien is not invalid under Section 70(c), then the lienor may constructively seize the property (by filing notice with the court) or otherwise perfect the lien against the fictitious bona fide purchaser (67(c)(1)(B)).[4]

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[3] Counsel for the trustee and amicus curiae argue forcefully that the vendor's privilege is not a true lien or real right against the thing subject thereto, hence it is a mere "priority". Great reliance is placed on *New Orleans Terminal Co. v. Hanson*, 183 F. 638 (6 Cir. 1911), and the comments of Planiol, English Translation, Vol. 2, Part 2, Civil Law Treatise, §§ 2606, 2608, 2609, 2618, 2619 and 2620. We do not believe that whether this privilege is a real right or not is necessary to this decision. The question here is to be determined by reference to Section 67(c) of the Bankruptcy Act and the definitions contained in the Act. With all deference to the Court in *Hanson*, however, it must be pointed out that that case involved an interpretation of the Louisiana law in a conflict of laws setting, and an opposite result might well be reached in Louisiana, applying its own law for application within its territorial limits. The eminent French commentator, Planiol, espoused the minority view in France, the majority view being that the creditor having a vendor's privilege enjoyed a real right to proceed against the property subject thereto, under the corresponding Article of the French Civil Code, 2102(4). The Louisiana jurisprudence tends to favor the majority view in France. See: Carlin v. Gordy, 32 La. Ann. 1285 (1880); Yiannopolis, *1 Louisiana Practice: Civil Law of Property*. § 106, § 108 at pp. 322-323 (1966); Daggett, *Louisiana Privileges and Chattel Mortgage*, § 39 at p. 94, § 51 at p. 134 (1942); Margolin, "Civil Law: Vendor's Privilege," 4 Tulane Law Review 239 (1929-30).

[4] It is worthy of note that "possession" by the lienor is no longer a prerequisite to assertion of secured status under Section 67(c). U. S. Code, Congressional & Administrative News, Vol. 2,

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The tests provided for by Section 67(c)(1)(A) are self-explanatory. The "bona fide purchaser test" of 67(c)(1)(B) with its reference to Section 70(c), has been explained as follows:

> "It is clear . . . that the enforceability of the statutory lien depends upon its state of perfection as of the date the petition is filed. Have the necessary steps been taken, by that date, to make the lien enforceable against a bona fide purchaser? That is the question to determine its validity.
>
> "A saving provision is included in clause (B) by the first proviso which permits perfection after the date of bankruptcy in some instances. This is where the lien has not yet been perfected to be enforceable against a bona fide purchaser but time is still permitted by state law for performing that particular act of perfection. In order to avail itself of this saving provision, however, the proviso requires that the lien be valid against the trustee under § 70c at the date of bankruptcy. For example, if state law creates, under prescribed circumstances, a statutory lien which is enforceable on particular property without recordation or any other act against judicial lien creditors but requires public filing, possession, levy, commencement of a legal proceeding or some act for it to be enforceable against bona fide purchasers, a case involving the first proviso could be presented." (Collier, supra, vol. 4, § 67.281[2.2], pp. 422-423.)

And:

> "The first sentence of § 70(c) insures that the trustee may make use of all the bankrupt's defenses that might otherwise be considered personal and hence not available to the trustee. The second sentence purports to confer certain status upon the

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p. 2462 (1966); Collier on Bankruptcy, vol. 4, § 67.20[3.1] at p. 229, § 67.20 [5.1], § 67.27[1.1] at p. 374, § 67.281[2] at pp. 416-417.

> trustee as of the date of bankruptcy—the status of a judgment creditor, the status of a creditor who obtained an execution returned unsatisfied, and the status of a creditor then holding a lien by legal or equitable proceedings as to all property upon which a creditor of the bankrupt could have obtained such a lien at bankruptcy." Collier, supra, vol. 4a, § 70.45, p. 558.

The Court must apply these tests to the vendor's privilege as that right is defined by the laws of Louisiana. And the hypothetical statuses given the trustee or "bona fide purchaser" are also governed by state law. Collier, supra, vol. 4, § 67.25[1] at pp. 347-348; Collier, supra, vol. 4a, § 70.49 at pp. 602-603, § 70.51[1] at p. 616. See, Murson v. Risinger, 114 So. 2d 59 (La. App. 1959). See also, Collier, supra, vol. 4, § 67.20[3.1], p. 229.

1. Louisiana's Privilege and Sec. 67(c)(1)(A):

Upon default in payment by the debtor, a vendor, in Louisiana, may sue for collection of the balance of the purchase price remaining unpaid; he may sequester the thing sold (LSA-C.C.P. art. 3571), and judgment will be with recognition of his vendor's privilege, to secure payment of the judgment. The privilege arises automatically upon the contract of sale,[5] and it can be enforced by sequestration, judgment and sale at anytime following default.[6] The privilege is enforceable regardless of whether the debtor is insolvent or his property is being distributed or liquidated, and whether or not the property has been seized by some other creditor seeking execution of a claim

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[5] Daggett, *Louisiana Privileges and Chattel Mortgage*, § 37, p. 96 (1942); Perot v. Levasseur, 21 La. Ann. 529 (1869); *State ex rel Landry v. Broussard*, 177 So. 403 (La. App. 1937).

[6] Margolin, "Civil Law: Vendor's Privilege," 4 Tulane Law. Rev. 239 (1929-1930).

against it.[7] Therefore, we conclude that the requirements of Section 67(c)(1)(A) are met by the vendor's privilege.

2. Louisiana's Privilege and Sec. 67(c)(1)(B):

We now apply the "bona fide purchaser" test of Section 67(c)(1)(B). It is the settled law of Louisiana that a vendor may enforce his privilege only so long as the thing sold remains in the possession of the original vendee. LSA-C.C. arts. 3217(7) and 3227. If the original vendee resells the thing to a third party bona fide purchaser who takes possession, then the privilege of the vendor is lost. *Wilson v. Lowrie*, 156 La. 1062, 101 So. 549 (1924); *Burdeau v. His Creditors*, 44 La. Ann. 11, 10 So. 395 (1891); *United Furniture Stores, Inc. v. Rogers*, 129 So. 377 (La. App. 1930); *Heard v. Noble*, 119 So. 479 (La. App. 1928); *Robinson v. Tatum*, 7 La. App. 335 (1927).

Section 67(c)(1)(B) does not require the assumption that a "bona fide purchaser" be in possession of the thing sold which is subject to the vendor's privilege.[8] Possession

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[7] *Converse, Kennett & Co. v. E. Hill & Co.—W. H. Letchford & Co.*, 14 La. Ann. 89 (1859). See, *Peoples Homestead & Saving Ass'n v. Masling*, 185 La. 800, 171 So. 36 (1936); *Suttle v. Biles*, 130 La. 448, 58 So. 144 (1912); *American Hoist & Derrick Co. v. Frey*, 127 La. 183, 53 So. 486 (1910); *American Furniture Co. v. Grant-Jung Furniture Co.*, 50 La. Ann. 931, 24 So. 182 (1898); *Cypress Shingle & Lumber Co. v. Lorio*, 46 La. Ann 441, 15 So. 95 (1894); *Lowden v. Robertson*, 40 La. Ann. 825, 5 So. 405 (1888); *Alex Kuhn & Co. v. Embry & Pilcher*, 35 La. Ann. 488 (1883); *Pinard v. George, Man. Unrep. Cas.* 176 (1880); *Ginn v. Ginn*, 48 So. 2d 655 (La. App. 1950); *Blitz v. Guenin*, 187 So. 690 (La. App. 1939); *Rains v. Thomason & Champion*, 135 So. 92 (La. App. 1931); *Max Barnett Furniture Co. v. Martel*, 3 La. App. 234 (1925); LSA-C.C.P. art. 2341.

[8] La. Civ. Code art. 1922:

> "With respect to movable effects, although, by the rule referred to in the two last preceding articles, the consent to transfer vests the ownership of the property in the obligee, yet this effect is strictly confined to the parties until actual delivery of the object. If the vendor, being in possession, should, by a second contract, transfer the ownership of the property to another person, who gets the

(continued)

by the original vendee *is* a requisite for protection of the seller and the enforcement of his vendor's privilege under Louisiana law. And, at the time of filing the petition in bankruptcy by the bankrupt-vendee in this case, this was the reality of the situation between the parties. Under these circumstances the vendor (Beneficial) had the right under Louisiana law to seize or sequester the article sold to the bankrupt even if legal title had passed to a bona fide purchaser, provided there had been no actual delivery of the property to cause the loss of its security. *Continental Bank & Trust Co. v. Succession of McCann*, 151 La. 555, 92 So. 55 (1922); *Flint & Jones v. Rawlings*, 20 La. Ann. 557 (1868). See, *Wilson v. Lowrie*, supra; *Alex Kuhn & Co. v. Embry & Pilcher*, supra. This result has been explained as follows:

> "The Louisiana courts follow the majority French view in consistently holding that a resale of the property by the vendee does not divest the original vendor of his privilege unless there has been actual physical delivery to the second vendee. [The author notes that a vocal minority (including Planiol) of the French commentators argue per-

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(continued)

possession before the first obligee, the last transferee is considered as the owner, provided the contract be made on his part *bona fide*, and without notice of the former contract."

La. Civ. Code art. 1923:

"In like manner, if movable property has been alienated by contract, but not delivered, it is liable in the hands of the obligor to seizure and attachment, in behalf of his creditors."

La. Civ. Code art. 2247:

"Sales or exchanges of movable property are void against *bona fide* purchasers and creditors unless possession is given before such *bona fide* purchaser or creditor acquires his right by possession. What a delivery of possession is depends on the nature of the property; it may be constructive or actual; the delivery of the key of a store in which it is contained, or an order accepted by the person in whose custody it is held, if at the order of the vendor, is good evidence of delivery."

> suasively that the French Code would not support such a position.] However, the Louisiana Civil Code contains three pertinent articles which are not found in the French Code at all [La. Civ. Code. arts. 1922, 1923 and 2247 (see also, art. 2480[9])], and it may be that these articles give Louisiana more justification for this position than the French courts and commentators have. . . . Hence, it seems that if these three articles are read together with Article 3227 on the vendor's privilege, the phrase 'if the property still remains in the possession of the purchaser' might reasonably mean in the actual physical possession of the vendee, and the Louisiana courts are, therefore, logical and right in their interpretation of the article. This interpretation would be justified in Louisiana where the similar French interpretation (which is not supported by the above three additional articles) is not justified." Margolin, supra, pp. 249-251.

Even assuming that the bona fide purchaser contemplated in Section 67(c)(1)(B) was in possession of the property, the first proviso of Section 67(c)(1)(B) would require a consideration of Section 70(c). And if the "statutory lien" is not invalid against the trustee "at the date of bankruptcy" under that section, and if it is required by applicable lien law to be perfected in order to be valid

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[9] Section 1(5) defines "bona fide purchaser" to include a "bona fide encumbrancer." If the bankrupt had executed a chattel mortgage on this furniture in all good faith and for its full value, there is no doubt that under Louisiana law the vendor's privilege would prevail so long as the property remained in the possession of the original vendee. *Weiss v. Hudson Construction Co.*, 151 La. 1, 91 So. 525 (1922); *Contnental Bank & Trust Co. v. Succ. of McCann*, supra. Since the contract of pledge in Louisiana requires delivery of the thing to the pledgee, the vendor's privilege is lost. *Pierson v. Carmouche*, 146 La. 798, 84 So. 59 (1920); *Fetter v. Field*, 1 La. Ann. 80 (1846). But the facts of this case are not complicated by these hypothetical situations. We re-emphasize that when the debtor filed his petition in this case he was in actual posssion of the furniture in question.

against a subsequent bona fide purchaser, it may nevertheless "be valid . . . if perfected within the time permitted by and in accordance with" such law. As is readily seen from the foregoing discussion, the time permitted Beneficial to perfect its lien was any time before the property left the bankrupt's actual possession. The second proviso of Section 67(c)(1)(B) makes filing of notice of its claim to the privilege by Beneficial, the equivalent of a seizure (under sequestration) of the thing subject to the privilege or "statutory lien".

The question then becomes whether or not the vendor's privilege is invalid against the trustee under Section 70(c). An examination of the "applicable lien law" (Louisiana law) requires the conclusion that the privilege is valid against the trustee.

In a distribution of the proceeds from the sale of the thing to which the privilege attaches, a creditor whose claim is secured by a vendor's privilege would come before a judgment creditor, or a creditor with a general lien on all of the bankrupt's property, or a creditor who had obtained an execution returned unsatisfied. *Converse, Kennett & Co. v. E. Hill & Co. - W. H. Letchford & Co.*, 14 La. Ann. 89 (1859); LSA-C.C. arts. 3183, 3267; LSA-C.C.P. arts. 1092, 2292, 2337, 2374, 2378, 3571; La. R.S. 9:2621.

The vendor's privilege, a special privilege on movables, is one of the most important and highest ranking security devices recognized in Louisiana. It has formed a cornerstone for credit in the economic structure of the mercantile trade in this State for centuries. It is not a spurious legal device to permit a debtor in failing cir-

cumstances to favor one creditor at the expense of another. Justice requires its recognition:

> "As long as the price is not paid the sale augments the patrimony of the buyer at the expense of the vendor; the latter has impoverished himself, he has alienated his property and has not yet received anything in exchange. The vendor has thus gratuitously augmented the common pledge of the creditors of the buyer; the latter can be paid with the property sold without the vendor being paid, they enrich themselves at his expense, which is unjust. The new property therefore can be veritably acquired by the buyer only by the payment of the price; in French legislation which admits the immediate transfer of the title, the privilege is necessary to prevent an inequity." Planiol, supra, No. 2608, p. 453. See, Carlin v. Gordy, 32 La. Ann. 1285 (1880).

Since the vendor's privilege meets the requirements of Section 70(c), and because Beneficial can enforce its privilege against a bona fide purchaser if the property is seized in the possession of the original vendee (by the filing of notice), it must be concluded that this privilege, a statutory lien, must be treated as a secured claim in bankruptcy. The case is remanded to the referee for treatment in accordance with this decision. We reverse and remand for further consideration not inconsistent herewith.

Counsel for Beneficial will prepare and submit a formal decree in accordance with Rule 9(e) of the Western District of Louisiana.

Lafayette, Louisiana, this 11th day of April, 1968.

/s/ R. J. Putnam
United States District Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26399

In the Matter of:

CALDWELL JOSEPH TRAHAN
RODNEY BERNARD, JR., Trustee,
Appellant,

versus

BENEFICIAL FINANCE COMPANY,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(November 26, 1968)

Before GEWIN and GODBOLD, Circuit Judges, and CHOATE, District Judge.

PER CURIAM: In this bankruptcy case the United States District Court for the Western District of Louisiana concluded that the appellee's claim is a secured claim and that it should be paid in due course as a secured creditor under the law of Louisiana affording a vendor's privilege to a seller of merchandise, LSA C.C. Art. 3227. It decided that the appellee was the holder of a statutory lien valid against the trustee under the bankruptcy statutes. 283 F. Supp. 620.

The district court wrote a well-reasoned and exhaustive opinion which fully sets forth the factual and legal issues involved. It is our judgment that the disposition of the case is correct and the judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 26399

D. C. Docket No. Bk 16,702

In the Matter of:

CALDWELL JOSEPH TRAHAN

RODNEY BERNARD, JR., Trustee,
Appellant,

versus

BENEFICIAL FINANCE COMPANY,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

Before GEWIN and GODBOLD, Circuit Judges, and CHOATE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the

Western District of Louisiana, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, In the Matter of: Caldwell Joseph Trahan, Rodney Bernard, Jr., Trustee, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

November 26, 1968

Issued as Mandate:

APPENDIX "C"

CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT

(June 6, 1911)

No. 2,100

NEW ORLEANS TERMINAL CO.

versus

HANSON

SALES (§ 302*)—LIEN OF VENDOR—LOUISIANA STATUTE—EXTRATERRITORIAL ENFORCEMENT

The privilege given to a seller of movable property by Civ. Code La. art. 3227, which provides that "he who has sold to another any movable property which is not paid for has a preference on the price of his property over the other creditors of the purchaser whether the sale was made on credit or without" is not a contract lien on the property but merely a preference over other creditors in the proceeds pertaining to the remedy or administration of the debtor's property, and cannot be enforced extraterritorially against a receiver appointed by a court in another state into which the property has been removed.

[Ed. Note—For other cases, see Sales, Cent. Dig. § 858; Dec. Dig. § 302.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

In Equity. Appeal by the New Orleans Terminal Company from a decree in a creditor's suit against the Gulf Compress Company denying it a preference claimed. Affirmed.

Caruthers Ewing, for appellant.

G. T. Fitzhugh (Fitzhugh & Biggs, on the brief); for appellee.

Before SEVERENS and KNAPPEN, Circuit Judges, and DENISON, District Judge.

KNAPPEN, Circuit Judge. This is an appeal from a decree of the Circuit Court denying the lien or preference claimed by appellant (hereinafter called the claimant) for the unpaid purchase price of certain compresses and other property, sought to be enforced by intervening petition in the receivership proceedings hereafter referred to. The material facts are these:

The claimant, a Louisiana corporation doing business at New Orleans in that state, on September 6, 1907, sold to the Gulf Compress Company, which is an Alabama corporation having its general offices in Memphis, Tenn., two cotton compresses, together with boilers, pumps, piping and other appurtenances, all to be delivered f. o. b. cars at Port Chalmette, La., for the price of $12,000, one-half to be paid in cash, and for the remaining $6,000 the note of the Compress Company to be taken, due in one year with interest. Delivery was made, one-half of the purchase price paid in cash, and note for the remainder given, all as per contract. The agreement of sale, which

was in writing, contained no reservation of title or lien. Indeed, by the express terms of the agreement of sale it was "covenanted and agreed on the part of the party of the first part (claimant) that it has the title to said compresses, boilers, etc., free from liens or incumbrances of every character, and that it has the right to make a sale to the party of the second part according to the terms of this contract." The Gulf Compress Company was operating in several states, including Arkansas. The property in question was purchased from claimant for the use of the Compress Company "in whatever state it operated," and immediately after being so purchased it was by the Compress Company transported to and installed at Little Rock, Ark., where it has been continuously since said removal and installation, and was in the possession of the Compress Company at the time of the appointment of its receiver, since which time it has been in the possession of that officer. On May 29, 1908, and thus while the property in question was installed in the plant of the Compress Company at Little Rock, Ark., the appellee was appointed receiver of the Compress Company under a bill filed by certain creditors and stockholders of the company, alleging its financial embarrassment and actual insolvency, and the necessity of a receiver for the protection of the interests of creditors and stockholders of the Compress Company, as well as all parties concerned; and praying that the bill be sustained as a general creditors' bill, and for the administration of the property rights and franchises of the Compress Company as a trust fund; that creditors be required to prosecute their claims in the court in which such receivership was prayed; and for an injunction against separate suits by creditors and stockholders. The Compress Company answered, admitting the allegation as to its insolvency, its inability to further carry on its business, and the necessity for the appoint-

ment of a receiver. Thereupon a decree was entered adjudging that the bill "be sustained as a general creditors' bill, and as such inure to the benefit of all creditors and stockholders who may come in under the same by intervention or otherwise as the court may herein direct"; requiring creditors to file their respective claims with the receiver appointed by the decree, and requiring the corporation to convey to the receiver all its property, with provision for ancillary proceedings in other jurisdictions. The intervening petition alleged the appointment of ancillary receivers "in those jurisdictions in which the defendant operated its business." The receivership was thus extended over the property in question in Arkansas.

Article 3227 of the Civil Code of Louisiana contains this provision:

> "He who has sold to another any movable property, which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale was made on a credit or without, if the property still remains in the possession of the purchaser. So that although the vendor may have taken a note, bond, or other acknowledgment from the buyer he still enjoys the privilege."

It is under this statutory provision that the lien in question is claimed for the $6,000 of purchase price represented by the note, and admittedly unpaid. The Circuit Court denied the claimed lien, being of opinion that the statutory privilege under the laws of Louisiana could not be enforced after the property had been carried beyond the territorial limits of that state and into the state of Arkansas, where it was being so held at the time of the assertion of the alleged lien by the receiver subject to the rights of creditors of the Compress Company. Claimant insists that the privilege given by the Louisiana statute

can be enforced even extraterritorially, and against the property in the hands of the receiver, upon the ground that the latter took no higher right than the Compress Company had. The question presented by the appeal relates to the correctness of this contention.

The fundamental inquiry relates to the nature of the "privilege" in question. This privilege, as existing under the Code of Louisiana, is unknown to the common law (Copley v. Sanford, 2 La. Ann. 335, 46 Am. Dec. 548); and we must therefore look to the provisions of the Code of that state. In Voorhies' Revised Civil Code of Louisiana an entire title, consisting of 94 articles, is devoted to the subject of "privileges." Reference thereto, in our opinion, clearly indicates that the term "privilege," as there used, relates to the preference or degree of preference between creditors in the distribution of the property or estates of debtors, as administered under the laws of Louisiana. The first four sections of the title in question read as follows:

> "Art. 3182. Whoever has bound himself personally, is obliged to fulfill his engagements out of all his property, movable and immovable, present and future."

No question of vendor's lien as against the purchaser (as distinguished from a preference as between creditors) is thus involved in the vendor's privilege in question.

> "Art. 3183. The property of the debtor is the common pledge of his creditors and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful causes of preference.
>
> "Art. 3184. Lawful causes of preference are privileges and mortgages.
>
> "Art. 3185. Privilege can be claimed only for those debts to which it is expressly granted in this Code."

Article 3186 declares that:

> "Privilege is a right, which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages.
>
> "Art. 3187. Among creditors who are privileged, the preference is settled by the different nature of their privileges.
>
> "Art. 3188. The creditors who are in the same rank of privileges, are paid in concurrence; that is, on an equal footing."

Article 3193 provides that "the debts which are privileged on all the movables in general" are (1) funeral charges (the reasonable amount thereof to be determined by the judge); (2) law charges (referring to such as are occasioned by the prosecution of a suit before the courts, with provision for the taxation thereof); (3) expenses of last sickness (to be "fixed by the judge, in case of a dispute"); (4) wages of servants for the current and past year (with provision that those for preceding years "form an ordinary debt, for which the domestics or servants come in by contribution with other ordinary creditors"); (5) six months' supplies of provisions (with provision that retail dealers as to all but the last six months "are placed on the footing of ordinary creditors"); (6) salaries of clerks and other persons of that kind; and (7) dotal rights due to wives by their husbands. Again, the privileges provided for are not always of the same class or attended with the same incidents. For example, the privilege of the lessor over the produce of the estate and the movables found thereon for his rent is declared by article 3218 to be "of a higher nature than mere privilege. The latter is only enforced *on the price arising from the sale* of movables to which it applies. * * * The lessor, on the contrary, may take the effects themselves and retain them until he

is paid." (Italics ours.) And by article 3258 of chapter 6, relating to "the order in which the privileged creditors are to be paid," the lessor is given preference "over all the other privileged debts of the deceased, such as expenses of the last illness and others which have a general priority of the movables." Articles 3220 and 3221 relate to the privilege on the thing pledged, including the sale of the property for payment of the debt. Articles 3222 and 3223 relate to the "privilege of a depositor."

Article 3233 declares that "innkeepers have a privilege, or more properly a right of pledge, of the property of travelers who take their board or lodging with them, by virtue of which they may retain the property and have it sold, etc." The innkeeper "must apply to a tribunal to have his debt ascertained, and the property seized and sold for the payment of it." Some of these privileges are thus shown to be liens and others not. Article 3227, upon which reliance is had here, has been already referred to. The privilege of the vendor of movables is there defined as "a preference *on the price of his property*, over the other creditors of the purchaser." (Italics ours.) The same article gives a "special lien and privilege" to the seller of agricultural products of the United States in the city of New Orleans, to secure the payment of the purchase money for and during the space of five days only after the day of delivery, during which time the seller may seize the product sold "in whatsoever hands or place they may be found, and his claim for the purchase money shall have preference over all others." Section 126 of Garland's Revised Code of Practice of Louisiana provides for "conflict of privilege resulting from writs in several suits" as follows:

> "Whenever a conflict of privileges arises between different creditors, all the suits and claims shall be transferred to the court, by whose mandate the property on which the privilege or right of mort-

> gage is to be exercised, *was first served on mesne process, or definitive execution; and said court shall proceed to class said privileges and rights of mortgage according to their rank and dignity, in a summary manner, after notifying all parties interested.*" (Italics ours.)

Section 300 provides for enjoining the sheriff from paying to the plaintiff the proceeds of the property seized, in case a third person oppose the payment on the ground that he has a "previous hypothecation or privilege, or any other right by which he claims to be paid in preference to the plaintiff."

It is thus seen that the vendor's privilege as to movables is merely a preference over other creditors in the proceeds of sale of the property affected by that preference; and that by the Louisiana Code the privileges declared thereby are inseparably connected with administrative machinery for their enforcement. This idea of the nature of "privilege" as a preference between creditors in the distribution of the property of debtors is referred to in Lee v. His Creditors, 2 La. Ann. 599, where Chief Justice Eustis, in discussing the question of a claimed "lien or privilege" sought to be enforced against a boat under a law of Kentucky, quotes from the opinion of Judge Watts the statement "that lien or privilege is part of the remedy seems clear, when we consider the purpose for which they are given. They are the means of enforcing a right, which right is always the payment of a sum of money; and a privilege or lien is the means of compelling such payment, and is analogous to a seizure or execution." While Chief Justice Eustis did not find himself "required to assent" to the proposition that the privilege in all cases pertained exclusively to the remedy, he did not dissent therefrom. His decision, however, seems to treat privilege as "a right or priority of payment."

The rule is well settled that priority or preference in the distribution of the estates of debtors, whether deceased or insolvent, is not a part of the contract, but pertains to the remedy or administration; that the statute laws of the state with respect to such matters have no extraterritorial force; and that the enforcement of such right of preference of priority is dependent upon the law of the place where the property lies and where the court sits. In Harrison v. Sterry, 5 Cranch, 289, 3 L. Ed. 104, which involved the distribution under a bill in equity of the effects of a bankrupt, the parties including assignees under both American and British commissions of bankruptcy, attaching and other creditors, Chief Justice Marshall, in holding that the United States was entitled to a claimed preference over all other creditors, notwithstanding the contract was not made within the United States or with American citizens said:

> "The law of the place where the contract is made is, generally speaking, the law of the contract; i.e., it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege, dependent on the law of the place where the property lies, and where the court sits which is to decide the cause. In the familiar case of the administration of the estate of a deceased person, the assets are always distributed according to the dignity of the debt, as regulated by the law of the country where the representative of the deceased acts, and from which he derives his powers; not by the law of the country where the contract was made."

In Smith v. Union Bank, 5 Pet. 518, 8 L. Ed. 212, where it was held, that the effects of the intestate in the hands of the administrator were to be distributed among his creditors according to the laws of Maryland, where

administration was being had, and not according to the laws of Virginia, where the intestate resided, and where the debt in question was contracted, the doctrine stated by Chief Justice Marshall in Harrison v. Sterry was followed. See, also, Scudder v. Bank, 91 U. S. 406, 412, 413, 23 L. Ed. 245. In Story on the Conflict of Laws, the author, after discussing the conflict upon the question of recognition by foreign countries of the existence or validity of liens or privileges created by the law of the place where the contract was made, says (8th Ed. § 323):

> "But the recognition of the existence and validity of such liens by foreign countries is not to be confounded with the giving them a superiority or priority over all other liens and rights acquired in such foreign countries under their own laws, merely because the former liens in the countries where they first attached had there, by law or by custom such a superiority or priority. Such a case would present a very different question, arising from a conflict of rights equally well founded in the respective countries. This very distinction was pointed out by Mr. Chief Justice Marshall in delivering the opinion of the court in an important case (referring to Harrison v. Sterry, supra). His language was: 'The law of a place where a contract is made is, generally speaking, the law of the contract; i. e., it is the law by which the contract is expounded. But the right of priority forms no part of the contract. It is extrinsic, and rather a personal privilege, dependent on the place where the property lies, and where the court sits which is to decide the cause.' And the doctrine was on that occasion expressly applied to the case of a contract made in a foreign country with a person resident abroad."

The courts of Louisiana recognize the rule that priority of payment created by the laws of another state will not be recognized by the courts of the state in which the property is found; thus:

In Lee v. His Creditors, 2 La. Ann. 600, where it was held that "privileges" on steamers and other vessels established by the laws of other states, unless expressly recognized by the laws of Louisiana will not be enforced there, it was said:

> "That a failure to acknowledge, or enforce, liens or privileges on movables created by foreign laws, cannot be considered as derogating from the comity which prevails among states in relation to the effect to be given foreign laws, is obvious. A nation within whose territory personal property is found, has as entire jurisdiction over it while there as it has over immovable property. Its exercise for all purposes is a question of policy, and may be coextensive with its authority over the latter"; and again "So far as authority is considered in relation to conflict of laws in similar cases, and the comity which is to be observed in relation to the priority of payment created by the laws of the place where the contract is made, the decisions of the highest tribunal in the Union are directly and positively against its recognition. Harrison v. Sterry, 5 Cranch, 298 [3 L. Ed. 104]; Smith, Administrator, v. Union Bank, etc., 5 Pet. 523 [8 L. Ed. 212]. In the distribution of insolvent estates under our laws, we are not aware of any distinction that is recognized among creditors, dependent on the place of the origin of the debts. The distribution is made according to the order of privileges and mortgages established in the Code, as of the proceeds of a common pledge."

In Swasey v. Steamer Montgomery, 12 La. Ann. 800, the question was presented whether a claim based on a statute of the state of Alabama, granting a privilege to demand toll of vessels passing through a channel, should be classed as a privilege in the distribution of the proceeds of the steamer. The claimed privilege was denied, the court saying:

> "We consider it settled under the decision in the case of Lee v. His Creditors, 2 La. Ann. 600, that privileges must be regulated by the law of the forum, and that none can be claimed except such as are expressly granted in the Civil Code."

In Gause v. Bullard, 16 La. Ann. 107, 108, the intervener claimed a privilege by reason of the purchase of property in question in the State of Georgia, by a citizen of that state, and with funds raised therein. In denying this privilege the court said:

> "It is perfectly immaterial whether, under the facts of this case, the intervener could claim a privilege in the state of Georgia; for this court has, on more than one occasion, said that we are to look to the provisions of our own laws for the existence and enforcement of privileges. Lee v. His Creditors, 2 La. Ann. 600; Wickham v. Levistones et al, 11 La. Ann. 702; Swasey & Co. v. Steamer Montgomery, 12 La. Ann. 800."

Claimant invokes Carlin v. Gordy, 32 La. Ann. 1285, as holding that the vendor's privilege is not a matter of remedy or administration. It is true that in that case the court used this language:

> "The privilege of the vendor is founded on the right of property. Payment of the price is essential to the vesting of the indefeasible title in the vendee. The vendor's rights to, and securities for, the payment of the price have always commended themselves to the favorable consideration of our courts."

This was said, however, in a case involving a contest in the Louisiana courts between the mortgagee of property and the vendor, who had levied "in execution of her judgment recognizing her vendor's privilege thereon," created by the laws of Louisiana. We see nothing in this

decision opposed to the view we have taken of the nature of this privilege.

Claimant relies, moreover, upon the familiar rule that while the statutes of a state have in themselves no extra-territorial force, yet rights acquired under them are always enforced by comity in the state and national courts in other states, unless they are opposed to public policy or laws of the forum.

But as we have already said, we think the privilege relied upon here is not a right acquired by contract under the laws of Louisiana, but is merely a preference relating to the distribution of the property or estates of debtors, and as such only a matter of remedy or administration with respect to which the doctrine of comity has no application. The statutes of neither Arkansas nor Tennessee recognize the existence of the vendor's privilege claimed here, and of course provide no machinery for enforcing it under ordinary circumstances. In view of the nature and extent of the receivership proceedings, the question of forum as between the two states is immaterial.

In view of the conclusion we have reached as to the nature of the claimed privilege, it is not necessary to consider whether the enforcement of a vendor's lien created by contract would be opposed to the public policy of the State of Arkansas. Nor is it material to this inquiry that the Louisiana courts recognize, as is asserted, the doctrine of comity as to contract rights to the extent of making it a matter not only of judicial recognition, but of Code requirement. The views we have expressed make it also unnecessary to consider the proposition urged by the receiver, that the property in question has become immovable by reason of its being affixed to the real estate, and thus not subject to the privilege under the Louisiana Code through

failure to give the notice required in order to preserve the privilege as to immovable property. Nor is it necessary to determine whether the receivership ordered under the bill in this cause operated as an attachment in favor of general creditors of the Compress Company. It is enough to say that the proceeding is one for the administration of the estate of an insolvent corporation, and that the privilege asserted relates to the assets of such insolvent corporation, so in the course of administation.

For the reasons we have stated, we are of opinion that the claimant had no privilege or lien upon the property in question enforceable in the court to which application was made, and in which administration of the affairs of the insolvent corporation is being had.

It follows that the Circuit Court rightly denied the privilege asserted, and that its order should be affirmed.

APPENDIX "D"

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"It will be recalled that one of the major objectives of the Chandler Act was to overcome the distortion of the Federal order of distribution by the creation of spurious statutory liens. To upset these liens which were in reality priorities, the authors of the Chandler Act decided that if statutory liens on personal property, unaccompanied by possession, were postponed to wages and costs of administration, the most serious effects of these liens could be overcome. This provision was strengthened in 1952 when most liens of this nature were completely invalidated. However, a recent re-examination of State lien statutes has shown that neither the standard of possession nor the distinction between real and personal property is an entirely satisfactory criterion. Some liens which are genuine property rights are affected and others which were essentially State-created priorities escape.

"To insure the supremacy of the order of distribution provided in the Bankruptcy Act insofar as it is consistent with the continued recognition of genuine lien interests, this bill would eliminate lack of possession of personal property as the standard for upsetting liens and would instead invalidate as against the trustee every lien which falls within any of the following categories:

> (1) Every statutory lien which first becomes effective upon the insolvency of the debtor, or upon distribution or liquidation of his property or upon execution against his property levied at the instance of one other than the lienor.
>
> (2) Every statutory lien not perfected at the date of bankruptcy as against a subsequent bona fide purchaser from the debtor on that date.

(3) Every statutory lien for rent and every lien of distress for rent.

"The first of these provisions strikes at liens which merely determine the order of distribution upon insolvency or liquidation. This kind of lien is not a specific property right which may be asserted independently of a general distribution and regardless of the transfer of the property. This is clearly a disguised priority.

"The second provision strikes at a lien which is so tenuous that it can be defeated by transfer to a bona fide purchaser. The holders of such liens have reason to know that their security is extremely vulnerable. It would seem that if, apart from bankruptcy, a lien is not good against a bona fide purchaser, then it should not be valid against the trustee. However, it should be noted that under the proviso to the new section 67c(1) (B), the substance of which is now found in section 67b, a lien that is valid against the creditors described in section 70c (and therefore against the trustee) may thereafter be perfected against bona fide purchasers and therefore against the trustee by filing notice with the bankruptcy court."

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Senate Report No. 1159 on the 1966 Amendments to the Bankruptcy Act.